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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

C. M. DOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

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Rule 71A, F.R.C.P. 8

In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, *Petitioner*

v.

C. M. DOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 11, 1956.

OPINION BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Appendix A, *infra*, p. 23-28) is reported at 238 F. 2d 898. A petition for rehearing *en banc* was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 28) was entered December 11, 1956. A petition for rehearing *en banc* was denied on January 3, 1957. By order of Mr. Justice Black, dated April 1, 1957, the time for filing a petition for certiorari was extended to and including April 19, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in proceedings by the Government to condemn an easement, a claim to compensation "arose and vested" in a landowner at the time of the entry into possession by the United States in 1943 or only, subsequently, upon the filing of a declaration of taking in 1946.

STATUTES INVOLVED

The relevant portions of the Second War Powers Act of March 27, 1942, 56 Stat. 177, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), and the Anti-Assignment Act, 31 U.S.C. 203, are set out in Appendix B, *infra*, pp. 28-32.

STATEMENT

On March 9, 1943, the United States commenced proceedings to condemn an easement for a pipe-line right-of-way over certain lands in Harris County, Texas, under the provisions of Title II of the Second War Powers Act of 1942 (R. 5). An Order for Immediate Possession was granted on the same date (R. 36), and the Government went into possession soon thereafter. The pipe-line was constructed and has been in continuous use since that time (R. 63).

In November 1945, respondent C. M. Dow acquired by deed 617.289 acres of land (R. 40, 67), embracing 2.7139 acres within the condemned right-of-way. Dow's conveyance was specifically rendered subject to the existence of the aforementioned condemnation proceedings (R. 46, 72). The conveyance referred to right-of-way easements and the pending proceedings and provided that the deed was executed "as being subject to the existence of the following easements and proceedings." (R. 45). There follows a listing of (a) a pipeline right-of-way easement dated November 1920, (b) a pipeline right-of-way easement granted October 1920, (c) an unrecorded easement for a power line and (d) these condemnation proceedings "as reflected in Lis Pendens Notice recorded * * *" (R. 45-46).

Subsequent to Dow's acquisition of title to the land, in May 1946, the Government filed a Declaration of Taking, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a)-258(e), for the condemned portion, and deposited the estimated compensation into the registry of the court (R. 64). Thereafter, commissioners appointed by the court under the Texas practice held a hearing for the purpose of determining compensation and damages due for the taking of said parcel (R. 64). Dow's vendors, the original condemnees, were deceased. Neither their heirs nor their executors and trustees were served with notice or appeared at the compensation hearing (R. 33). Dow did appear and offer evidence as to value.

The report of the commissioners, awarding $4,500 as compensation for the taking of the condemned parcel, was filed in November 1948. The United States thereafter moved to set aside this award (R. 31), alleging

that the parties entitled to compensation were neither served nor present at the commissioners' hearings (R. 33-35), and that Dow had no right, title or interest to the parcel at the time it was taken by the United States; that his deed was a prohibited assignment of a claim against the Government and, thus, ineffective; and that he was therefore not entitled to compensation for the taking (R. 53). In March 1956, the motion for summary judgment was granted (R. 61), the earlier award of compensation by the commissioners was set aside, and judgment was entered accordingly (R. 73).[1]

The Court of Appeals for the Fifth Circuit reversed. It held that, despite the earlier physical appropriation by the United States in 1943, no claim to compensation "arose and vested" until the filing of a declaration of taking three years later in 1946,[2] and therefore that there was no prohibited assignment of a claim against the United States. 238 F. 2d 898, Appendix A, *infra*, pp. 26-28. The case was remanded for further proceedings consistent with this holding.

REASONS FOR GRANTING THE WRIT

The Court of Appeals agreed with the District Court that under the Anti-Assignment Act (Appendix B, *infra*, p. 32) a claim to compensation for a taking of property cannot be voluntarily transferred after it has

[1] The United States does not claim, of course, that Dow's vendors are not entitled to compensation. If their heirs, executors, or trustees should come into court, on an appropriate motion, they would be entitled to the compensation.

[2] Judge Rives, the author of the opinion below, had expressed the same views earlier; in his dissenting opinion in *Slattery Company, Inc.* v. *United States of America*, 231 F. 2d 37, 50.

arisen (Appendix A, *infra*, p. 26). And, apart from the Anti-Assignment statute, the established eminent domain rule is that it is the owner at the date of taking who is entitled to compensation.[3] The Court of Appeals reversed the trial court, however, on the ground that a taking did not occur and a claim to compensation did not arise when possession was taken in 1943 but only when, more than three years later in 1946, title was acquired by the filing of a declaration of taking under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a), and a deposit made in court of the estimated compensation. A brief review of the basic principles and established procedures relating to the federal power of eminent domain will demonstrate, we believe, not only the error of the decision below but its disruptive effect upon the whole process by which property needed for federal purposes is acquired. The ruling is unjust to many landowners as well as the Government and opens the door for manipulation whereby the amount the Government is required to pay may, without just cause, be substantially increased. In fact, the ruling would not provide for just compensation under the Constitution.

I.

The central significance of the Government's taking-of-possession, as distinguished from the later passage of title, can be seen from the settled principles of federal eminent domain.

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[3] *Danforth* v. *United States*, 308 U.S. 271, states (p. 284): "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment." Cf. *United States* v. *Dickinson*, 331 U.S. 745.

1. The power of eminent domain does not rest upon express constitutional grant but is implied from the necessity of acquiring the property essential to prosecution of the Government's appropriate functions without interference by owners unwilling to part with their property. *Kohl* v. *United States*, 91 U.S. 367, 371-372; *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 527-530. The Fifth Amendment limits the exercise of this power to the extent that it requires the payment of just compensation. However, it does not, as do the constitutions of many states (often referred to as "first pay" jurisdictions), require that compensation be paid in advance, or at the time, of appropriation of the property. *Hurley* v. *Kincaid*, 285 U.S. 95, and cases there collected (p. 104). See also *Garrow* v. *United States*, 131 F. 2d 724 (C.A. 5), certiorari denied, 318 U.S. 765. In the "first pay" jurisdictions, a governmental body which seizes property prior to institution of some proceeding to determine compensation is a trespasser. But when a properly authorized officer of the Federal Government physically occupies property, it is not a tort or trespass but constitutes a taking under the power of eminent domain. The owner is provided an adequate remedy to obtain compensation in the District Court or Court of Claims for such a taking by the Tucker Act (now 28 U.S.C. 1346(a)(2) and 1491) and consequently cannot prevent the taking by injunction nor recover trespass damages against the government officers or agents. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *Yearsley* v. *Ross Constr. Co.*, 309 U.S. 18, 21-23.

The power of eminent domain has been so exercised constantly for more than 80 years by physical acts constituting a seizure of real estate or the assertion of

dominion over it. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181, holding that "where real estate is actually invaded * * * so as to effectually destroy or impair its usefulness, it is a taking * * *." We are not here concerned with the many difficult problems whether particular acts may constitute a taking rather than consequential damage, nor at what point in the course of a continuing process a taking occurs. *United States* v. *Dickinson*, 331 U.S. 745. Under any definition, the acts here involved, which were the physical entry upon real estate, the laying of an oil and gas pipe-line through it, and the continued operation of the line (R. 63), constituted a taking of a servitude or easement for these purposes. During World War I, the Tucker Act form of exercise of the eminent domain power was in substance adopted in Section 10 of the Lever Act, 40 Stat. 276, 279, whereby persons dissatisfied with the amount offered them as compensation for seizure of their property could withdraw 75% of the estimated amount and bring suit in the appropriate District Court to recover just compensation. See, *e.g.*, *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 302.

Another means of exercise of the right of eminent domain is through the institution by the United States of condemnation proceedings. The first exercise of that power by proceedings brought by the United States in a federal court appears to be *Kohl* v. *United States*, 91 U.S. 367. In 1888 and 1890, two general statutes, which are still effective, were enacted, providing authority for the institution of condemnation proceedings whenever government officers are empowered to procure real estate for public uses. Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257; Act of August 18,

1890; 26 Stat. 316, 50 U.S.C. 171. At that time, the procedure in such cases conformed to local law, and this was not changed until Rule 71A, F.R.C.P., became effective in 1951 except for the ancillary procedure established by the Declaration of Taking Act of 1931, discussed later (*infra*, pp. 13-14).

The condemnation proceedings under the 1888 and 1890 Acts (which are now often denominated "ordinary" proceedings) represented a process whereby the price of acquisition might be ascertained before any rights in the land were acquired by the Government. In such cases, the judgment represented, in effect, an offer to the condemnor which it was free to accept or reject. Upon acceptance by payment of the stated amount into court, title to and the right to possession of the interest condemned vested in the Government. See *Danforth* v. *United States*, 308 U.S. 271, 284-285. Such "ordinary" condemnation proceedings are still frequently employed when time is not pressing. However, at least by the time of World War I, the need for expedition resulted in the amendment of the 1890 Act so as to permit the taking of immediate possession of lands as to which proceedings to condemn for military purposes have been instituted. Act of July 2, 1917, 40 Stat. 241, 30 U.S.C. 171. A similar permanent authority for taking immediate possession of lands subject to condemnation is applicable to river and harbor improvements. Act of July 18, 1918, 40 Stat. 911, 33 U.S.C. 594. Various other statutes have authorized the courts to order the taking of immediate possession and such orders have been entered in the absence of statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C.A. 8). During World War II, the Second War Powers Act authorized the

courts to order the immediate taking of possession and this authority, under which possession was taken in the instant case, was widely used. Act of March 27, 1942, 56 Stat. 176 (Appendix B, *infra*, p. 29). But the power to take possession and leave compensation to be determined in Tucker Act proceedings is not waived by the institution of condemnation proceedings; therefore, possession can also be taken at any time without court order. *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324 (C.A. 9).

Thus, the federal power, which has always existed, to seize possession of property prior to payment of compensation has been legislatively recognized and procedures for such taking have been set out in various statutes; in addition, there has been nonstatutory confirmation of the power to take possession. The important point, in the present connection, is that this Court has always recognized that the substantive law, such as the measure of just compensation, is the same whatever form the exercise of eminent domain takes. This is necessarily so since the landowners' constitutional rights are the same whether the Tucker Act procedure or condemnation proceedings are employed. See, e.g., *Hurley* v. *Kincaid*, 285 U.S. 95, 104, that "The compensation which he may obtain in such a proceeding [Tucker Act] will be the same as that which he might have been awarded had the defendants instituted condemnation proceedings which it is contended the statute requires." Cf. *United States* v. *Dickinson*, 331 U.S. 745; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *2,648.31 Acres of Land*, 218 F. 2d 518 (C.A. 4). In *Jacobs* v. *United States*, 290 U.S. 13, this Court declared (p. 16): "The fact that condemnation proceedings were not instituted and that the right was

asserted in suits by the owners did not change the essential nature of the claim." And as recently stated, "Under the decisions it is of no moment whether the taking is by physical action of the Government, or by means of condemnation proceedings. The measure of compensation is the same; only the procedure differs." *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375, 379 (C.A. 7).

2. Basic to the Tucker Act decisions is the fact that the taking which creates the right to compensation is the physical seizure of the property. In one of the earliest and leading cases, *United States* v. *Lynah*, 188 U.S. 445, 470-471, the distinction between the taking and the transfer of title was spelled out as follows:

> It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and *when the amount awarded as compensation is paid the title*, the fee with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner. (Emphasis added.)

The principle is reiterated in brief form in later decisions that "The owner is protected by the rule that title does not pass until compensation has been ascer-

tained and paid * * *." *Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 587; *Danforth* v. *United States*, 308 U.S. 271, 284-285; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U.S. 641, 659.[4] In Tucker Act cases there is always some ambiguity as to the extent of the interest taken. Circumstances may indicate merely a temporary occupancy rather than a permanent taking (*United States* v. *Causby*, 328 U.S. 256), and only that interest is awarded which is necessary for operation of the government project involved (*United States* v. *Cress*, 243 U.S. 316). The findings of fact and judgment in the Tucker Act case specify the title which in the condemnation proceeding is designated in the petition. In both instances that title vests upon payment of the judgment. The many aspects in which the date of taking—meaning the date of taking possession—is significant will be mentioned later (*infra*, pp. 16-21) One of the most important is that at the time of taking the obligation to pay arises and the Constitution requires that compensation, usually in the form of interest, be made for the delay in payment. The basis for this requirement was expressed in *Old Dominion Co.* v. *United States*, 269 U.S. 55, 65:

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice

[4] Like all general rules, this one is subject to qualifications which have no bearing on the instant case, such as that if the United States has paid the value of property into court in proper proceedings it is not responsible for mistakes that may be made in distribution of the funds resulting in the true owner not receiving payment, nor does this rule prevent the passage of title in those cases where the owner fails to take advantage of his opportunity to recover compensation within the six-year limit of the Tucker Act or other applicable time limit.

for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston*, 15 Pick. 198, 208.

The leading case on this subject, *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, is express that taking means taking possession, when it says (p. 306): "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[5]

It is thus clear that a seizure of possession constitutes a taking giving rise to a claim for compensation which may be enforced in Tucker Act proceedings if the Government does not provide a remedy by instituting condemnation proceedings. And when condemnation proceedings are so instituted, the earlier taking of possession constitutes the date of taking. For example, in *United States* v. *Rogers*, 255 U.S. 163, interest was awarded from the taking in 1912 although the proceedings were not instituted until 1915.[6] See also *Forbes* v. *United States*, 268 Fed. 273, 278 (C.A. 5); *McKendry* v. *United States*, 219 F.2d 357 (C.A. 9); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 254 (C.A. 4).

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[5] This opinion is also significant in that it designates as "condemnation" proceedings under the Lever Act which procedurally is very similar to the Tucker Act (see *supra*, p. 7).

[6] 1912 was also used as the date of valuation. *United States* v. *Rogers*, 257 Fed. 397 (C.A. 8).

3. The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a, establishes a procedure whereby at any time before judgment in any pending condemnation proceeding the United States may file a declaration of taking and deposit estimated compensation in court. Thereupon, title vests in the United States, the right to compensation vests in the former owner, the United States is irrevocably committed to taking the land,[7] and the court is empowered to make appropriate orders as to possession and other matters. The Act provides for a judgment awarding compensation including interest on whatever amount by which the ultimate award may exceed the amount of the deposit. The prime purposes of this statute were, as its title states, "to expedite the construction of public buildings and works" by permitting the demolition of existing structures and construction of public buildings without awaiting the conclusion of the case (see section 5, 40 U.S.C. 258(e)), to prevent the accumulation of interest charges against the United States, and to relieve hardship on landowners by making funds available to them immediately. This latter element is important since few of the authorities for taking possession (*supra*, pp. 8-9) provide for or require the making of a deposit. The declaration of taking procedure is not a new and separate proceeding, but is merely an ancillary or incidental step in an existing proceeding. It does not change rules of finality for purposes of review. *Catlin* v. *United States*, 324 U.S. 229, 240-241. It is in addition to existing

[7] If no declaration is filed, the Government can abandon the condemnation at any time before the actual payment of the award, even after judgment. *Supra*, p. 8; *infra*, pp. 15-16.

rights and does not abrogate, modify or limit them. Section 4, 40 U.S.C. 258(d). The interest provisions of the Act are simply declaratory of the constitutional requirement and, hence, do not apply when just compensation is determined by the parties as a matter of agreement in a case where a declaration of taking was filed. *Albrecht* v. *United States*, 329 U.S. 599.

II.

Applying these principles, the Courts of Appeals had uniformly held, prior to the instant case, that "it is well settled that, either where no declaration of taking is filed, or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession the market value of the property taken should be determined as of the date possession was acquired." *11,000 Acres of Land, etc.* v. *United States*, 152 F. 2d 566 (C.A. 5), certiorari denied, 328 U.S. 835; *United States* v. *Vilbig*, 208 F. 2d 663 (C.A. 5); *Anderson* v. *United States*, 179 F. 2d 281 (C.A. [illegible]), certiorari denied, 339 U.S. 965; *Comparet* v. *United States*, 164 F. 2d 452 (C.A. 10); *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351 (C.A. 2). While holding that the Assignment of Claims Act was not violated for other reasons particular to that case, the court in *23 Tracts of Land* v. *United States*, 177 F. 2d 967, 970 (C.A. 6), likewise declared that "it would seem clear that the taking of physical possession of the property by the Government and the appropriation of it to its own purposes is a taking for which the then owner is entitled to compensation under the constitution * * *. This would seem to be equally true whether the taking is without authority of a court

order or in compliance with a court order requested by the condemnor."[8]

The decision below is thus inconsistent in principle with all of the Courts of Appeals cases dealing with the situation where possession is first taken and a declaration of taking is later filed. These cases cannot be distinguished, as the court below suggests, on the ground that they hold that, as an equitable rule, property should be valued at a time prior to the date which the court held to be the date of taking. (Appendix A, *infra*, pp. 27-28) Instead, they hold that "generally speaking the date property is taken is the correct valuation date" (*Vilbig*, p. 664) and in the *Anderson* case the opinion states the question before it to be "which date was the time of the taking." So also in *Comparet* the court ruled (p. 453): "When the Government acquired possession in 1942 there was a 'taking' of appellant's property for public use; compensation therefor was then due and payable, and under the Federal rule of decisions its fair market value should be determined as of that date." The holding in the present case that the claim for compensation does not arise until title is taken cannot be reconciled with the rationale of those decisions. And it is certainly illogical to conclude that compensation for a "taking" in 1946 is to be measured by values in 1943.

The fact that until title passes, either by filing of a declaration of taking or by payment of a final condemnation judgment or Tucker Act judgment, the United States may change its intention to take the property permanently, abandon the proceedings to

[8] The *23 Tracts of Land* case, like the present one, involved a transfer between the date the Government took possession and the subsequent filing of the declaration of taking.

take fee title, and then be liable only for the temporary possession it has taken does not prevent the claim for compensation from arising at the date of taking possession. It merely means that the extent of the taking, which is always more or less dubious in Tucker Act cases (see *supra*, p. 11), is also subject to that possible change of intention. Even the title which passes under the Declaration of Taking Act is defeasible under some circumstances. *Catlin* v. *United States*, 324 U.S. 229. The existence of power to abandon does not negative a taking under the Tucker Act or in condemnation proceedings when no declaration of taking is filed. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7). And the filing of a declaration of taking subsequent to an actual taking should not affect the result since the declaration is merely ancillary and incidental to the pending proceeding.

For these reasons, we submit that the decision below is (a) gravely erroneous because of the court's misapprehension of the fundamental nature of the federal power of eminent domain and the established modes of its exercise, and also (b) in basic conflict with the principles of comparable eminent domain cases in other circuits.

III.

If the theory of the view taken below were consistently applied, the consequences would be highly disruptive and damaging.

1. Certainly, the rights of landowners would be seriously impaired. The obligation of the United States to compensate, usually in the form of interest, for

failing to make payment at the date of taking cannot arise until there has been a taking and the claim to compensation has arisen. To deprive landowners of interest prior to the time title to their property vests in the United States would be of serious concern in view of the many pending condemnation proceedings for river improvements, airfields and other governmental purposes. And the ruling would discourage government officers from filing declarations of taking and thereby subjecting the United States to interest liability which, under the theory of this decision, would not otherwise exist—since federal officials are under a duty not to waste government funds. Cf. *United States* v. *Miller*, 317 U.S. 369, 381.

In other cases the rationale of the decision would also deprive landowners of compensation to which they should be entitled. In *United States* v. *Dickinson*, 331 U.S. 745, this Court held that the landowner's recovery was not to be decreased by reclamation that occurred after the date of taking. Since the extent of ownership must be determined at the time the claim to compensation arises (the date of filing the declaration of taking, under the holding below), the landowner's compensation would under the decision below be diminished by reclamation activities of the United States while in possession prior to filing a declaration of taking. And the decision throws doubt upon the owner's right to include in compensation improvements damaged or destroyed by the Government prior to taking title.

The ruling might likewise have the effect of depriving a particular party of compensation to which it is justly entitled. Many properties, such as railroad rights-of-way, churches, public parks, etc., are held

subject to reverter if use for the designated purpose ceases. Heretofore, the federal courts have uniformly rejected the claim of the reversioner to any substantial compensation for the reason, *inter alia*, that there was no gap between cessation of use and taking. *Terminal Coal Company* v. *United States*, 172 F. 2d 113, 116 (C.A. 3).[9] The court there stated "The contention of appellant could have validity only if some interval of time elapsed between the surrender of the interest of the railroad and that of appellant." But under the decision below an interval of years might intervene between cessation of use and accrual of the claim to compensation. With such a foundation it would be difficult logically to deny the claim of the reversioner to all of the compensation.

A different aspect of the same fundamental problem is shown by *People* v. *Peninsula Title Guaranty Company*, 301 P. 2d 1(Cal.), holding that the taking of possession under court order is a taking, with the result that the land was not subject to a special assessment lien for drainage purposes attempted to be subsequently recorded. *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C.A. 7), suggests a situation where to protect himself against claims of his tenant a lessor might be forced to oppose a taking of possession rather than settle the matter amicably with the United States. If a taking of possession is not a taking, the tenant might well claim eviction and breach of the covenant of quiet enjoyment.

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[9] *People of Puerto Rico* v. *United States*, 132 F. 2d 220, 221-222 (C.A. 1), certiorari denied, 319 U.S. 752; *Woodville* v. *United States*, 152 F. 2d 735, 737-738 (C.A. 10), certiorari denied, 328 U.S. 842; *State of Texas* v. *Harris County Houston Ship C. N. Dist.*, 158 F. 2d 861, 864 (C. A. 5).

Each of these illustrations simply emphasizes the great difficulty, if not impossibility, of valuing property as of one date, but according to its physical condition and the state of its title at a considerably later date.

2. The theory of the decision would likewise open the door to manipulations which would unduly increase the Government's liability. The status of the lands, as well as the designation of the person entitled to receive compensation, must be fixed at the date the claim arises. After the United States takes possession the landowner has, in practical effect, only a right to recover compensation. A subsequent conveyance of title is therefore simply a transfer of that right and does not transfer the right to use the land, as does the usual conveyance executed prior to the governmental taking of possession. A single parcel, because of plottage or other reasons, may be valued at more than the sum of its four component tracts. Cf. *United States* v. *Runner*, 174 F. 2d 651 (C.A. 10). The ruling below permits the owners after the date of valuation to combine their interests by transfer, solely for the purpose of obtaining an increased award. Similarly, after physical use has ceased, a purchase might be made by an adjoining landowner in order to create a claim, not otherwise existing, for so-called severance damages.[10] See *United States* v. *Miller*, 317 U.S. 369. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, further demonstrates the possibility of manipulation. There, land subject to an easement of way, light,

[10] The possibility of some such claim is not just speculation. There is now pending in the Court of Appeals for the Second Circuit a case in which the owner claims severance damage on the basis of a "correction deed" received after the date of taking.

and air was condemned. The fee owner and the beneficiary of the easement claimed that the property should be valued as an unencumbered fee and the resulting award divided between those interested. The values as agreed to by the parties showed that acceptance of this contention would have increased the value more than tenfold from $5,000 to $60,000. This Court rejected the claim holding that "the Constitution does not require a disregard of the mode of ownership of the state of the title." Similar cases in federal condemnation arose in *Southern California Fisherman's Association* v. *United States*, 174 F. 2d 739 (C.A. 9) and *Messer* v. *United States*, 157 F. 2d 793 (C.A. 5). Landowners could, under the decision below, avoid this rule by simply merging their interests after the Government has taken possession but before title has passed.[11]

3. While by no means exhaustive, the foregoing are a few examples of the scope of the consequences which

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[11] The rationale of the holding below that the taking occurred in 1946 (when the declaration of taking was filed) should have compelled the court to hold that the property taken must be valued as of that time. Inconsistently, the court held, however, that the valuation should be measured as of 1943, when possession was taken. Appendix A, *infra*, pp. 27-28; *supra*, pp. 14-15. If this qualification as to valuation were removed by the Fifth Circuit or some other court, the Government would apparently be forced to pay rental value for the period between the taking of possession and the filing of the declaration of taking, and the value of the property would then be valued as of the later date. In most instances, the total award would be much higher than an award calculated on the value of the property as of the time of taking possession. The alternative would be to force the United States to file a declaration of taking in every case, even though that procedure has been recognized, since its inception, as a mere ancillary mechanism which need not be used. *Supra*, pp. 13-14.

follow a determination as to the date of taking in condemnation proceedings. That determination is basic to the orderly conduct of every such case. There are now pending 2,530 condemnation cases, involving 30,736 tracts of land. In a great many of them the authority to take possession before filing a declaration of taking has been exercised. Although the vast majority of these cases will ordinarily be settled without trial, doubt as to the date of taking will undoubtedly make more difficult the ascertainment of the amount owing, either by agreement or trial. Such doubt will likewise impede the resolution of disputes between claimants as to title and the final distribution of the amount awarded. The decision and opinion below by a Court of Appeals with jurisdiction over an area of great importance to federal eminent domain cannot fail to raise such troubling doubts.

CONCLUSION

It is submitted that the decision below is erroneous and is in conflict with well-established principles on an issue which is fundamental to the conduct of federal condemnation proceedings. It is important both to the United States and to the landowners that this question be resolved by this Court. It is submitted, therefore, that this petition for a writ of certiorari should be granted.

Respectfully,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

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